No. 13862

United States Court of Appeals

For the Ninth Circuit

NELSE MORTENSEN & CO., INC., *Appellant,*

vs.

KENNETH S. TREADWELL, Trustee of Puget Sound Products Co., a corporation, Debtor, and SEATTLE ASSOCIATION OF CREDIT MEN, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

LITTLE, LESOURD, PALMER, SCOTT & SLEMMONS,
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THE ARGUS PRESS, SEATTLE

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BRIEF OF APPELLEES

STATEMENT OF FACTS

After acquiring the real estate involved in this action, the Defense Plant Corporation, a government corporation, erected a building or shed on the premises (Tr. 147) and placed therein certain machinery and equipment. In the latter part of 1947, the property was put up for sale and invitation for bids circulated, calling for offers with respect to real estate and personal property (Ex. 7; Tr. 149, 150, 151). Pursuant to this invitation, Puget Sound Products Co. submitted two bids, one for the real estate and the other for the personal property (Tr. 151, 152). The company purchased the real estate for approximately $58,000.00 (Tr. 152) and the personal property for $32,678.40 (Ex. 8; Tr. 154, 155, 156, 157).

The Reconstruction Finance Corporation, as successor to the Defense Plant Corporation, acting by and through the War Assets Administration, issued its quitclaim deed to the Puget Sound Products Co. as the purchaser (Ex. 3; Tr. 83, 84). This deed served not only as a conveyance of the real estate but also as a bill of sale covering the personal property, including machinery and equipment which is the subject of this controversy.

Thereafter, Puget Sound Products Co. gave its promissory note to the War Assets Administration, acting for the Reconstruction Finance Corporation, covering the purchase price of the machinery and equipment (Ex. 8; Tr. 154, 155, 156, 157), which was secured by purchase money chattel mortgage describing the chattel machinery and equipment (Ex. 9; Tr. 159, 160, 161, 162). The property involved in this dispute is listed as personal property in this mortgage, except for the heating system (Tr. 182, 226) and boiler (Tr. 146), which were acquired later by the Puget Sound Products Co. and used in connection with its business.

The company also gave its real estate mortgage in favor of the government agency covering the real property (Ex. 2; Tr. 81, 82, 83).

The purchase money mortgages given to the Reconstruction Finance Corporation were intentionally redrafted so as to eliminate any coverage of "after-acquired property", since the Puget Sound Products Co. desired to place additional machinery and equipment on the premises in such manner as to make it readily removable (Ex. 19; Tr. 256, 257, 258, 259).

The Puget Sound Products Co. was unable to make the payments required on its notes. Since the Reconstruction Finance Corporation was pressing for payment, certain of the mortgaged personal property was sold and the proceeds used to pay off the note secured by the purchase money chattel mortgage (Tr. 164, 263, 264). The real estate mortgage was subsequently foreclosed and the property sold to the United States of America (Tr. 117, 118, 119).

After acquiring title to the mortgaged personal property, Puget Sound Products Co. executed and delivered its chattel mortgage dated June 27, 1949, in favor of United States Sheetwood Company (Ex. 18; Tr. 250), and shortly thereafter executed and delivered its chattel mortgage in trust dated July 7, 1949, in favor of Seattle Association of Credit Men (Ex. 10; Tr. 168) as security for claims and debts totaling $80,000.00. Both mortgages covered all of the machinery and equipment involved in this proceeding.

In October, 1951, Nelse Mortensen & Co., Inc., became interested in obtaining the use of the building (Tr. 367). At the instigation of one of the officers of Puget Sound Products Co., Appellant negotiated with the Seattle Association of Credit Men for the purpose of acquiring its right of redemption (Tr. 247). On November 5, 1951, these negotiations culminated in an agreement (Ex. 3; Tr. 353, 354, 355) under which Appellant obtained redemption rights to the real estate. Appellant's attorneys represented the Seattle Association of Credit Men in giving the notice of redemption (Tr. 364) and in the

presentation of the order (Ex. 4; Tr. 122, 123, 124). Subsequently, Appellant took possession of the real estate on about November 5, 1951, pursuant to the order of redemption (Tr. 380).

Prior to the time of its acquisition of the real estate, the Appellant had full knowledge of Puget Sound Products Co.'s ownership of the disputed items of property (Tr. 196, 197, 371, 372), and Mr. Nelse Mortensen, Appellant's President, even discussed the possible purchase of some of this property from the Puget Sound Products Co. (Tr. 373). And it was during this period that Mr. Worth C. Goss, representing the Debtor in Possession, Puget Sound Products Co., negotiated with Appellant for the occupancy of the real estate in return for Appellant's free use of the cranes and other equipment (Tr. 181). Later, this matter was the subject of conversations between Mr. Goss and Mr. Nelse Mortensen and Mr. Henderson or Mr. Hendrickson, representing Appellant (Tr. 370, 371, 372, 373), with apparently mutually satisfactory conclusions (Tr. 196, 197). The matter of Puget Sound Products Co.'s occupancy of the property also was discussed with a representative of the Seattle Association of Credit Men (Tr. 247), who in turn testified that the subject was covered in conversations with one of Appellant's attorneys (Tr. 364), since such an arrangement was of benefit to the Seattle Association of Credit Men and the creditors it represented (Tr. 361).

The transcript of record in this case shows that the property items in dispute are placed, located and installed as follows:

Cranes: The cranes are self-controlled units, including motors, running on wheels (Tr. 138, 145). The supports consist of heavy timbers separated from the main building structure (Tr. 176) with removable fastenings (Tr. 177), or bolted to the concrete (Tr. 224, 225), but forming no part of the structural support of the building (Tr. 215).

Lighting system, including transformers. It is the usual network of wiring and conduit (Tr. 223), which may be removed without injury to the building (Tr. 184). The transformers are located in the vault and set free on the floor (Tr. 138, 177, 178, 179).

Heating system. The oil-fired heater is self-operative and portable (Tr. 182, 226, 234, 235).

Auxiliary fire pump. This pump sits on a platform beneath the main dock, is not a part of the dock structure, and is removable without damage to the dock (Tr. 183, 205, 232, 233).

Boiler. The boiler is not affixed to the property but sits on the floor (Tr. 183, 184) or pit (Tr. 225, 226), and is not connected to anything except a network of pipes now disconnected (Tr. 229).

Compressor. The compressor is located on the premises (Tr. 140), but there is no indication that it is affixed in any way to the premises (Tr. 231, 233).

Trumbull switchboard. This panel is located in the vault (Tr. 182), with material attached to it which apparently is the property of the utility company supplying the power (Tr. 182).

ARGUMENT AND AUTHORITIES

I.

The Findings of Fact Should Not Be Set Aside Unless Clearly Erroneous

In the instant case, the Referee's Findings of Fact and Conclusions of Law were affirmed by the District Court. These Findings of Fact should not be set aside unless clearly erroneous. Collier, on Bankruptcy, 14th Edition, Volume 2, §25.30, on page 964, states as follows:

> "These principles have been generally affirmed by the Federal Rules of Civil Procedure. Rule 52(a) provides that in non-jury cases, whether *formally at law or in equity*:
>
> " 'Findings of Fact should not be set aside unless clearly erroneous, and due regard shall be given the opportunity to the Trial Court to judge the credibility of the witnesses.'
>
> "Thus, in *Matter of Earnest* (C.C.A. 2nd (1939)), 107 F.(2d) 760, it was stated:
>
> " 'Concurrent Findings of Fact by the Referee and Judge will ordinarily be accepted on appeal (citations omitted) but not where a mistake is clearly shown. (Citations omitted)' "

In the case of the *Morris Plan Industrial Bank v. Henderson* (C.C.A. 2, 1942) 131 F.(2d) 975, Judge Learned Hand states:

> "General order 47 requires the Judge to 'accept his' (the Referee's) 'Findings of Fact unless clearly erroneous.' These are the same words used in Rule 53(e) (2) and substantially the same as those in Rule 52(a) which requires us not 'to set aside' the Findings of a Judge unless it too is 'clearly erroneous.' * * * In the end, as we have often said, the responsibility for the right conclusion remains the

> Judge's as indeed it does ours (citations omitted) but we have again and again held that except in plain cases, he should accept the Referee's Findings. (Citations omitted) We, therefore, hold that the question is the same in this Court as it was in the District Court."

In this connection, see also *Mergenthaler v. Dailey* (C.C.A. 2, 1943) 136 F.(2d) 182, wherein Circuit Court Judge Charles E. Clark says:

> "We have the same duty as the District Court to accept the Referee's Findings unless they are clearly erroneous."

The Findings of Fact of the Referee in the case at bar are abundantly supported by the evidence as indicated in the transcript. The Referee found that the items claimed by the Appellant were personalty. The Referee found, as a matter of fact, that Nelse Mortensen & Co., Inc., and Puget Sound Products Co. had agreed that the Puget Sound Products Co. could use the premises without charge. Therefore, Nelse Mortensen & Co., Inc., should take nothing by this appeal.

II.

Appellant Is Bound by Agreements Fixing the Status of the Machinery and Equipment As Personalty

Agreements establishing the personal nature of articles either attached to the freehold or capable of being so attached have long been recognized by the Washington Supreme Court as binding on the parties thereto and their successors in interest. An early Washington case on this subject, which has been cited and followed many times, is *German Savings & Loan Society v. Weber,* 16

Wash. 95, 47 Pac. 224, 38 L.R.A. 267. This case involved a prior mortgagee claiming items which had been attached to a building by a materialman pursuant to an agreement between the mortgagor and the materialman that said items should be regarded as personalty. The Court held that the items, even though "fixtures", could be removed provided the realty would not be injured in the process.

In *Robinson Codfish Co. v. Porter Fish Company,* 75 Wash. 181, 134 Pac. 811, the vendor of a building containing 36 large vats used for curing codfish agreed with the conditional purchaser that the vendor should be allowed to remove said vats from the building at some later time. Several subsequent agreements were made between the parties regarding the realty but these made no special reference to the vats. Later, the vendor executed a deed to a subsequent assignee of the conditional purchaser who then declared the vats were fixtures and therefore could not be removed by the original vendor. The Court in this case summarizes its results at page 182 as follows:

> "Appellant bases its appeal upon its contention that the vats were real fixtures and passed with the deed. It does not, however, appear to us that it is necessary to determine whether the vats were fixtures or chattels, as we believe the lower court was correct in holding that they were at all times treated by the parties to the respective agreement as chattels and there was at no time any intention or purpose to pass them from the ownership of the codfish company. * * * We think it is also established that the appellant had actual knowledge of the situation as to the vats and understood that the claim

> of the codfish company as to the ownership and right of possession was acquiesced in by the creamery company. We think it, therefore, clear that, so far as the legal situation is concerned, the parties, by the express stipulation in the original contract, intended to, and did, fix the status of the vats as personal property, the possession of which was to be preserved and retained by the codfish company, and that it was likewise intended to preserve this status under the modified agreements. We do not think it will be disputed that the owner of real estate may contract or agree with his tenant that things used in the building and for that purpose attached to it may be treated as chattels and remain the property of the tenant, subject to removal at the termination of the lease. No authority will be required to establish that such is the law."

A case very similar to the one at bar which establishes the right of the Appellee in this case to retain the items as personalty is *Boeringa v. Perry,* 96 Wash. 57, 164 Pac. 773. This was an action to foreclose a chattel mortgage given by one Sewell to respondent on the pump house, motor and pipe used to irrigate Sewell's property. The pipe was embedded in the ground and was considered by the trial court to be of a permanent nature. The appellant obtained a right of entry by foreclosing Sewell's right of entry to the desert land and claimed the pipe was part of the realty. The Court held that the chattel mortgage constituted an agreement between Sewell and the chattel mortgagee and, since appellant was the successor in interest to Sewell and had notice of the chattel mortgage, the appellant was not entitled to claim the pipe as part of the realty. The Court states at page 59:

"Generally speaking, an agreement that chattels affixed to realty shall retain a personal character may be either in writing or parol. (Citations omitted) In general, it may be said that almost anything affixed to realty may by agreement be treated as personalty. Thus it has been held that houses and other buildings, machinery, railroad tracks, nursery stock, and, indeed, practically everything which before annexation was personal property may still retain their chattel character by an agreement to that effect. But the right to preserve the personal character of fixtures by agreement is limited to chattels which are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, or without destroying or materially injuring the realty to which they are attached.

* * *

"It has been held in many cases that, if competent parties make an express agreement that fixtures shall retain their character as chattels, there can be no doubt that the agreement is binding as between the parties thereto. (Citations omitted) And where one purchases an article to be annexed to the freehold which, from its character, may, after annexation, be either realty or personalty according to the intention of the parties, the giving of a chattel mortgage thereon to the seller is sufficient evidence of an intention that the fixture shall retain its character as personalty. (Citations omitted)

"An agreement that the fixture shall retain its personal character is said to be implied from the mere giving of a chattel mortgage. (Citations omitted) It is, therefore, well settled, as between Sewell and appellant, that the status of the pipe mortgaged to appellant was fixed as a chattel."

And at page 62 in the above-cited opinion, the Washington Supreme Court finds that the chattel mortgage was filed and interprets the effect of such filing under the Washington statutes as follows:

> "* * * The effect of this provision is that the due filing of a chattel mortgage, as was the case here, imports as much as actual and positive notice of the mortgage and of all its conditions to all persons dealing with the chattel thereafter."

The statements quoted above are indicative of the law throughout the United States as evidenced by the general reference works. In 36 C.J.S., Fixtures, §13, at page 917, it is stated:

> "As a general rule, parties, as between themselves, may, in their dealings with chattels annexed to, or used in connection with, real estate, fix on them whatever character, as realty or personalty, on which they may agree, such right being, in some jurisdictions, recognized by statute, and the law will enforce such understanding whenever the rights of third parties will not be prejudiced. Thus it is generally held that an agreement by the owner of the land, in favor of the owner of the article at the time of annexation, or of one of them having a lien thereon, to the effect that the article shall retain its personal character or be removable as personalty, is ordinarily valid and effective as against the former, precluding a claim by him to the article as part of the land, to the exclusion of the latter. As discussed infra §14, an implied agreement to this effect is equally effective."

In 36 C.J.S., §18b, at page 934, it is stated:

> "Apart from statute, the authorities are generally in accord that an agreement preserving the char-

> acter of a chattel to be annexed to realty, or conferring a right of removal with respect thereto, prevails as against a subsequent purchaser or mortgagee of the realty who has notice, actual or constructive, of the agreement, where, or provided, it is sometimes held, the chattel can be removed without material injury to the freehold or the usefulness of the chattel. This rule has been applied as against purchasers at a judicial sale."

The recent case of *Anderson-Tully Co. v. United States* (C.C.A. 5, 1951) 189 F.(2d) 192, indicates that the Courts are not willing to allow parties to renege on their agreements by means of mere change in legal form. In this case, the Government leased from the Anderson-Tully Co. certain lands partially under water near the city of Vicksburg, Mississippi, under a series of leases extending from 1924 through June 30, 1945. These leases provided that the Government should have the right to attach fixtures and structures which should remain the property of the Government and might be removed prior to the termination of the lease. During its tenancy, the Government filled part of this land and erected warehouses, mooring pilings and a piling structure to carry pipelines which were used to move oil from barges moored in the canal. Anderson-Tully refused to renew the Government's lease on June 30, 1945, and the Government, thereupon, informed the land owner that it would acquire the premises by condemnation. Thirty days later the Government of the United States filed a petition in condemnation to acquire a fee simple title to the land and the District Court entered an order authorizing such possession and confirming occupation of the land. The Appellant, Anderson-Tully, in this case, is de-

manding that the condemnation award include both the value of the land and the fixtures which had been placed on that land by the Government. At page 196, the Court states:

> " * * * And in determining whether an object remains personalty or becomes a part of the realty, the courts in the United States have almost universally accepted the so-called intention test. In the case at bar the United States expressly reserved title to improvements placed upon the land and there can be no presumption that the Government intended to confer public property upon appellant."

In the instant case, Appellant obtained its title to the real property by exercising the right of redemption of the Seattle Association of Credit Men after the United States Government had foreclosed the Real Purchase money mortgage Puget Sound Products Co. had given to the Reconstruction Finance Corporation. This mortgage does not mention "fixtures" and by its terms refers only to real estate. On the same day, at the same time, the Puget Sound Products Co. gave to the Reconstruction Finance Corporation a separate chattel mortgage covering all the items claimed by the Appellant, except the boiler and portable heating system. The equipment claimed by the Appellant in this case was segregated from the land and building in the "invitation for bids" issued by the War Assets Administration. The facts show that separate bids were made for both the personal property and the real property. The Appellant, through its dealings with the Seattle Association of Credit Men, Puget Sound Products Co. and W. L. Grill, had both actual and constructive knowledge of the separation of

the chattels from the real estate of the old shipyard at Houghton.

The above-cited cases and authorities as applied to the facts of this case clearly indicate that the Appellant has no right as to those chattels which its predecessor in interest sold as personalty to the Puget Sound Products Co. The portable oil heater and broiler were placed on the property after the time of the execution of the real estate mortgage to the Reconstruction Finance Corporation and are not covered by the mortgage given to the United States which was drawn so as to exclude "after-aquired property". These items are not fixtures and are not in any way subject to the claims of the Appellant.

These items of after-acquired property are not included in the real estate mortgage. The case of *Holt v. Henley,* 232 U.S. 637, 641, held that an automatic sprinkler system subject to another security instrument (and here the chattels are subject to outstanding chattel mortgages) should not be held to be a fixture and thus subject to a prior real estate mortgage. The Court says, at page 641:

> "* * * The system was attached to the freehold, but it could be removed without any serious harm for which complaint could be made against Holt, other than the loss of the system itself. Removal would not affect the integrity of the structure on which the mortgagees advanced. To hold that the mere fact of annexing the system to the freehold overrode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachment by bolts and screws. * * * "

III.

Chattels Have Not Reverted to Realty

On page 32 of the Appellant's brief, it is stated that the acceptance of a chattel mortgage by the Reconstruction Finance Corporation constituted a severance of these items from the real estate and made them personal property only insofar as the chattel mortgage was concerned. The Appellant then goes on to state that when the mortgage was paid and released the property thereby covered resumed its original status as fixtures annexed to the land, and cites the case of *Parrish v. Southwestern Washington Production Credit Association,* 41 Wn.(2d) 586, 250 P.(2d) 973, as being exactly in point on this question. It is difficult to understand how this case can be considered as being directly in point to establish the aforementioned proposition.

In the *Parrish* case, *supra,* Miriam and Rolla Parrish were husband and wife, and for many years had financed the operations of their cranberry bog through means of chattel mortgages given to the Southwestern Washington Production Credit Association. Thus, as between the Southwestern Washington Production Credit Association and the two Parrishes, these items covered by the chattel mortgage were established to be personalty. The only intention which could be referred to as an agreement between Rolla and Miriam Parrish was an implied agreement that, by both agreeing to mortgage these items as chattels, Rolla and Miriam were giving these items some status as chattels. There was never a chattel mortgage between Miriam and Rolla.

Miriam and Rolla contemplated a divorce, but, prior

to the divorce, all chattel mortgages executed by Miriam and Rolla in favor of the Credit Association were paid up. As part of the divorce settlement, Miriam was given a $75,000.00 real estate mortgage against the cranberry bog. Subsequent to the execution of this mortgage, Rolla alone executed chattel mortgages in favor of the Credit Association. Suit was brought by Miriam Parrish to foreclose her real estate mortgage. The chattel mortgagee, Production Credit Association, alleged that Miriam could not claim the machinery and equipment under her prior real estate mortgage because she had *at one time* executed chattel mortgages *with her ex-husband* covering the same items as chattels. The Credit Association was maintaining that Miriam could not change her intention even though her interests were changed and her real estate mortgage clearly stated that "fixtures" were included under the mortgage.

Furthermore, the Credit Association had both actual knowledge of the divorce and constructive knowledge of Miriam's mortgage covering the fixtures on the property, and of course knew that Miriam was in no way a party to the chattel mortgages made between Rolla Parrish and the Association subsequent to her divorce.

This is a very different situation than the one in which the Appellant finds itself. Appellant in this case takes only those rights that the United States Government had under its real estate mortgage. The Government itself had agreed that the chattels and the real property should be treated separately. If in the *Parrish* case Miriam Parrish had received both a real estate mortgage and a chattel mortgage from Rolla, and later had

cancelled the chattel mortgage upon receiving payment in full, as a matter of simple justice, the Court would not have allowed Miriam or her successors to seize both the chattels and the realty from Rolla under the real estate mortgage.

A case much closer in point is *Mattechek v. Pugh,* 153 Ore. 1, 55 P.(2d) 730, 168 A.L.R. 725, wherein the Court states:

> "Whether an article attached to the realty is real property or personal property is dependent, not only upon its character and the manner of its attachment, but also to some extent upon agreements, if any, relating to its status. The giving of a bill of sale to an article attached to the soil at the same time a deed is executed covering the realty is an indication that the parties intended the articles should be deemed personal property. The bill of sale in such an instance effects a constructive severance of the article from the soil and restores to it its original status as personalty. * * * In *Folsom v. Moore,* 19 Me. 252, the same principle was applied. There, according to the evidence, the owner of the real property at the time of its sale gave to the purchaser a deed, and at the same time sold as personal property a stove attached to the real property. The court, in holding that the stove was personal property, remarked: 'It would be against every principle of justice, to permit the plaintiff, after having sold it as personal, to turn around and reclaim it, as part of his real estate.' See, also, *Fortman v. Geopper,* 14 Ohio St. 558; Tiffany, Real Property (2d Ed.) §273; and 26 CJ, Fixtures, p. 676, §39. This court has recognized that parties may agree that the annexation of a chattel to the land shall not deprive it of its character as personalty. (Citations

omitted.) Likewise, this court has held that the interested parties may agree that an article already annexed to the soil shall be deemed personalty. (Citations omitted) Such agreements are effective between the parties and those having notice."

The honest justice of this opinion is reflected in the Washington case of *Hill's Garage v. Rice,* 134 Wash. 101, 234 Pac .1023. In this case, the defendant had sold, by a bill of sale, certain garage tools and equipment to his sublessee, the plaintiff. After several transfers of interest by both the plaintiff and the defendant of their respective rights in the garage tools and the lease of the premises, the defendant attempted to declare that the garage tools and equipment had become fixtures and were thus part of the realty and were, therefore, his, even though he had previously sold this equipment to the plaintiff by a bill of sale and received from the plaintiff a chattel mortgage as security for the unpaid portion of the sales price. The Court states at page 105:

" * * * The defendant recognized all this property as personal property by selling it to the plaintiff as such; he further recognized it as personal property of the plaintiff when he took the chattel mortgage on it from the plaintiff; he further continued to recognize it as personal property by prosecuting his attempted foreclosure of that mortgage up to the final judgment; and finally he recognized it as personal property when he removed it, manifestly then claiming it as such; the property being at all times since prior to its sale by the defendant to the plaintiff situated and attached to the premises as at the time of its removal by the defendant. These facts, taken together with the very doubtful fixture character of the articles, which

> were but slightly attached to the premises and removable without injury to the premises, we think, call for the conclusion that the defendant cannot successfully invoke in support of his claim to the property the general rule applicable between a tenant and a landlord owner of the premises."

The above-cited cases are in agreement that a party cannot transfer items by a bill of sale or treat certain equipment as chattels by giving a chattel mortgage and then regain title to such items by declaring them to be "fixtures" subject to a real estate mortgage covering the land on which such equipment or items are located.

The title obtained by Nelse Mortensen & Co., Inc., to the property must stem either from (a) the title of the United States of America after entry under the decree of foreclosure, or (b) the title it obtained from the Seattle Association of Credit Men by reason of exercising its right of redemption. It is the contention of Nelse Mortensen & Co., Inc., as stated on page 14 of their brief, that:

> "Appellant, Nelse Mortensen & Co., Inc., acquired the same title that the United States of America would have acquired if no redemption of the property had been made."

Assuming, for the purpose of argument, that the Appellant's position, as stated above, is well taken, Nelse Mortensen & Co., Inc., would not have title to the machinery and equipment listed in the bill of sale from the United States Government to Puget Sound Products Co. The United States of America sold the machinery and equipment and real property by separate sales to the Puget Sound Products Co. It took back from the

Puget Sound Products Co. separate mortgages, one covering the real estate and one covering all the machinery and equipment. The United States of America, just prior to the commencing of its foreclosure action on the real property, accepted from Puget Sound Products Co. payment in full of the chattel mortgage. It is obvious that the United States, if it had acquired a Marshal's Deed, could not claim the machinery and equipment covered by the chattel mortgage as being fixtures and thus subject the real estate mortgage under the authorities cited herein and by the rules of simple justice.

IV.

The Property Claimed by Appellant Does Not Constitute Fixtures and Improvements and Is Not a Part of the Real Estate

As has been pointed out, the Appellant knew that the items claimed in this action were not subject to the real estate mortgage redemption right which Appellant purchased from the Seattle Association of Credit Men. Even if this were not true, however, the facts of this case disclose that the items claimed by the Appellant are not fixtures or improvements to the real estate and therefore cannot be subjected to the real estate mortgage as claimed by the Appellant.

The Appellant has cited a number of cases in its brief and has quoted certain favorable excerpts from them to support its position that these items are fixtures or improvements. The danger of quoting brief excerpts from cases dealing with the law of fixtures, and the fallacy of relying on such statements in a dif-

ferent factual situation, is succinctly stated by the Washington State Supreme Court in the case of *Strain v. Green,* 25 Wn.(2d) 692, 695, 172 P.(2d) 216, wherein the Court says:

> "We will not undertake to write a treatise on the law of fixtures. Every lawyer knows that cases can be found in this field that will support any position that the facts of his particular case require him to take. As early as 1899, the Court said, in *Philadelphia Mortgage & Trust Company v. Miller,* 20 Wash. 607, 56 Pac. 382, 72 Am. St. 138, 44 LRA 559:
>
> " 'There is a wilderness of authority on this question of fixtures * * * cases * * * are so conflicting that it would be profitless to undertake to review or harmonize them.' "

The case of *Filley v. Christopher,* 39 Wash. 22, 80 Pac. 834, cited by the Appellant on page 16 of its brief, is undoubtedly correct as to the criterion of a fixture being a united application of (1) actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold. To maintain, however, that the case holds that specific items such as a furnace and boiler, or an electric switchboard, should be considered as fixtures and a part of the realty in this case at bar would be misleading. For example, in the above-cited case, the furnace and boiler in question were located in the basement of a theatre building resting on a foundation built

up through the floor, were encased in brick work, and could not be taken out or removed without tearing away the masonry. This is certainly not at all comparable to the portable heating system in the building involved in this case. Furnaces have often been declared to be chattels as opposed to fixtures and the Courts have, therefore, allowed them to be removed from the premises. Cf. *Becwar v. Bear,* 41 Wn.(2d) 37, 246 P.(2d) 1110; *Whitney v. Hahn,* 18 Wn.(2d) 198, 138 P.(2d) 669. These two cases both involved a furnace being declared a "trade fixture" and, therefore, not annexed to the realty. This conflict on furnaces is just one example which demonstrates the danger of attempting to classify an object as a "fixture" or as a "chattel" by quotation of authority without ascertaining the facts of the particular case.

The Appellant next discusses the "intention test" and on page 17 of its brief cites the case of *Cutler v. Keller,* 88 Wash. 334, 153 Pac. 15, to indicate that different presumptions of intention are established by different relationships such as landlord and tenant, vendor and vendee or mortgagor and mortgagee. Respondents agree that, in the absence of definitely ascertained intention, the Court is forced to rely on such presumptions as can be ascertained from the differing types of relationship between the parties. In the case at bar, however, there is no doubt as to the intention of Puget Sound Products Co. and the Government of the United States and all other parties with an interest in these items to treat them as personalty. It is not necessary, therefore, to engage in "presumptions" derived

from varying relationships to determine the intention of the parties. The validity of this position is demonstrated by the Appellant's own brief on pages 18 and 19. The Appellant quotes from the case of *Ballard v. Alaska Theatre Co.,* 93 Wash. 655, 161 Pac. 478, in part as follows:

> " * * * The intent is not to be gathered from testimony of the actual state of mind of the party making the annexation (*Washington Nat. Bank v. Smith,* 15 Wash. 160, 45 Pac. 736); but is to be inferred, *when not determined by an express agreement,* from the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made." (Emphasis supplied)

In the above case, the Court allowed an organ to be removed even though it required a tearing out of part of the walls and partitions surrounding it and further allowed chairs which were bolted to the floor to be removed and the bolts to be clipped off flush with the concrete floor.

The cases of *Siegloch v. Iroquois Mining Co.,* 106 Wash. 632, 181 Pac. 51, and *Reeder v. Hudson Consolidated Mines Co.,* 118 Wash. 505, 203 Pac. 951, cited by the Appellant on pages 19 and 21 of his brief, are distinguishable on the ground that these cases involve the foreclosure of a real estate mortgage involving "improvements" to "mining property". Mining properties are of a special nature since there is nothing to distinguish mining property from the surrounding land except the machinery and development actually taking

place thereon. As the court says in *Siegloch v. Iroquois Mining Co., supra,* at page 636:

> "Turning to the evidence, we find nothing which the Court awarded the owners which cannot be said to be an improvement of the property. It must be borne in mind that this is mining property, having no value over and above the surrounding property unless the ores it contains can be extracted from it. To extract these ores profitably and successfully, machinery of the sort here in question is an essential. It is all attached to the realty; is fixed in place and permanent in the sense that it can remain so attached and fixed until destroyed by the elements or worn out by use. Plainly, we think, these articles are improvements of a permanent nature, which enhance the value of the realty for the uses for which it is intended."

The case of *King v. Title Trust Co.,* 111 Wash. 508, 191 Pac. 748, is cited by the Appellant on page 21 of its brief for the proposition that an elevator was established to be a fixture even though an agreement had been made between the owner and the seller of the elevator that it should remain personal property. It should be pointed out that the basic theory of the *King* case is that innocent third parties should not be prejudiced by secret agreements. The facts of the instant case amply demonstrate in this case that the Appellant was fully informed as to the agreements between the parties, and the Appellant is in direct privity with the Seattle Association of Credit Men and the United States Government, both of whom were parties to the original agreements establishing the machinery and equipment as personal property. The *King* case clearly

establishes the Court's desire to hold individuals to their agreements by the following statement at page 514:

> "On the other hand, if it were a controversy between the owner of the building and the elevator company as to whether or not the elevator plant is personal property as between them, we would as readily hold it to be personal property, since by their express agreement that title should remain in the elevator company until the purchase price was paid in full, they impliedly agree that, as between them, it should be regarded as personal property until paid for. *Boeringa v. Perry,* 96 Wash. 57, 164 Pac. 773.
>
> "We would also hold the elevator plant to be personal property, even as between the elevator company and appellants, if it were shown that the latter had knowledge of the agreement and understanding in that behalf made between the owner and the elevator company. *Allis-Chalmers Mfg. Co. v. Ellensburg,* 108 Wash. 533, 185 Pac. 811. * * * "

The cases of *Hall v. Dare,* 142 Wash. 222, 252 Pac. 926; *Nearhoff v. Rucker,* 156 Wash. 621, 287 Pac. 685, and *Strong v. Sunset Copper Co.,* 9 Wn.(2d) 214, 114 P.(2d) 526, are relied upon by the Appellant on pages 22-24 of its brief as indicating various possible degrees of annexation capable of establishing that an item is a fixture. As pointed out in previous sections of this brief, such items as chairs bolted to a concrete floor and a furnace enclosed in masonry have been declared to be chattels and subject to removal by the party claiming them as personalty. The cases cited by the plaintiff again indicate the danger of lifting from context quo-

tations of the court and using these to classify certain items as fixtures. For example, extremely heavy and ordinarily very permanent items have been declared to be personalty by the courts. In the case of *Bell v. Swalwell Land, L. & T. Co.,* 20 Wash. 602, 56 Pac. 401, a materialman was allowed to remove a three-story dwelling house from the realty which was claimed by the owner of the land who had been selling said land under a real estate contract to the materialman's employer. In the case of *Columbia Lmbr. Co. v. Bothell Dairy Farm,* 174 Wash. 662, a materialman lienor of a lessee was allowed to remove a golf club house from land being repossessed by a lessor even though the lease provided that all improvements should belong to the lessor upon termination of the lease either by forfeiture or expiration of the term. The case of *Westinghouse Company v. Hawthorne,* 21 Wn.(2d) 74, 150 F.(2d) 55, cited by the Appellant on page 26 of its brief, held that certain pushbuttons, switches and motors that were equipped with sliding rails were not to be considered as fixtures. These cases amply demonstrate that the mere size or manner of affixation of an object are not necessarily determinative of its nature as a fixture or a chattel.

The case of *Forman v. Columbia Theatre Co.,* 20 Wn.(2d) 685, 148 P.(2d) 951, is cited by the Appellant on pages 24 and 25 of its brief, for the purpose of establishing that conduits and wiring, switches, switch boxes, signs and other articles come within the term "improvements". This case is a very similar to the case at bar in that the lessor leased the real property to the

defendant and later executed a bill of sale for certain items of personalty within the theatre. *However, the successors in interest to the lessor were not attempting to claim items within the bill of sale* (as Appellant is attempting to do here) but instead conceded that the items listed on the bill of sale were personalty by agreement and should therefore be allowed to be removed from the realty. It is interesting to note that some of the items established as personalty by the said bill of sale in this case included an organ, 500 opera chairs, the fire protection system, stage and house draperies, and many other items. The specific items in dispute in the above-cited case were not listed in the bill of sale and the lessee (Columbia Theatre Company) was trying to include these additional items as personalty under the term "etc." contained in the bill of sale. The Court, of course, rejected this interpretation and stated that such objects should remain on the property as permanent improvements since the individuals would have included them in the bill of sale if they were to be treated as personalty. On page 691, the Court states very well the principle which we believe should be applied in the case at bar:

> "As to these items counsel has ably briefed the law of fixtures. However, we do not believe that law is applicable to the case at bar. Our conclusion is that the contract between the parties determines the ownership of the property in question and for that reason, the rights of the parties depend entirely on the proper interpretation of the instrument.
>
> "If the various leases had been silent as to the

ownership of the items in dispute, then the ownership would necessarily have to be determined upon whether or not there were fixtures and, if so, to whom they belonged—to the landlord or tenant. When, however, a landlord and tenant make a lease arrangement in which there are stipulations relative to the ownership of chattels which may be placed on the leased premises by the tenant, the agreement will be enforced regardless of what might be the rights of the parties at common law. In cases of that character the contract is the law made by the parties themselves which must determine their rights."

The case of *Westinghouse Company v. Hawthorne,* 21 Wn.(2d) 74, 150 P.(2d) 55, cited by the Appellant on page 26 of its brief, *does not* state that the items mentioned by plaintiff on page 26 such as engines with sliding rails, pulleys, switches, and pushbuttons, are to be considered fixtures under the facts of that case. For example, on page 82 the Court says:

"As this is the only testimony concerning the use of these pushbuttons, it must be held that the evidence did not show they were fixtures."

On page 83:

"Several of the motors furnished were equipped with sliding rails. The evidence does not show how these rails were used or installed. Upon the record it cannot be held that they ever became fixtures."

On page 84 the Court says:

"In the *Zimmerman case* [*Zimmerman v. Bosse,* 60 Wash. 556, 111 Pac. 796] it was held that engines, lathes, saws, edgers, planers, etc., were not fixtures, but remained personalty. In the case at bar there is no evidence that the motors used in

operating the machines were intended to be or had become fixtures. * * * ''

The case of *Strain v. Green,* 25 Wn.(2d) 692, 172 P.(2d) 216, is cited by the Appellant to establish the proposition that the ''secret intention'' of the parties annexing the item is not in any way determinative of whether the item is a chattel or a fixture. The Respondents do not deny this principle but maintain that the record is amply clear that the intention of the parties as to these items being personalty has been maintained from the beginning of negotiations between Puget Sound Products Co. and the United States Government Agencies.

The case of *Theodore A. Kochs Co.* (C.C.A. 7, 1941) 120 F.(2d) 603, cited by the Appellant on page 28 of its brief, is not in point regarding the question of machinery becoming a part of the realty and passing under a real estate mortgage since in that case the annexor owned both the plant and the machinery at the time of installation and continued to own and operate same at the time the mortgage was given to the mortgagee, whereas in the case at bar the original owner (the United States Government) specifically classified the machinery and equipment as personal property by calling for separate bids, by executing a quit claim deed of the real property separate from the conveyance of the personal property, and by taking back separate mortgages on each. The Court *in re Theodore A. Kochs Co., supra,* specifically recognizes the right to separate machinery from realty in regard to mortgages as can be seen from the Court's comments on page 606:

> "The mortgagor of industrial property has it within his means to exclude any portion of his property from the operation of the mortgage. In the instant case the owner of the factory might have limited the scope of the mortgage to the factory stripped of its machinery, but instead it provided expressly that the mortgage was to cover the realty and the fixtures. Certainly the terms of the mortgage are consistent with the conclusion reached in the preceding paragraph and, under the circumstances, if the mortgagor had intended the machinery not to share the legal fortunes of the realty, it should have stated as such. It is too plain for words that (1) the law treats the disputed items of property as fixtures and that (2) the property fits the legal description of the mortgage."

Thus, it can be seen that, under the law of fixtures, the items claimed by the Appellant are not fixtures or improvements. The two large overhead cranes are not in any way attached to the building but are self-contained units that run on overhead tracks. The transformers claimed by Nelse Mortensen & Co., Inc., are housed in a cement vault merely set on the floor therein. The auxiliary fire pump, compressor and Trumbull switchboard, the portable oil heater, and the boiler, have not been physically affixed to the realty.

V.

The Agreement and Consideration Connected with the Use of the Premises by Appellee Has Been Established

The Referee found that Nelse Mortensen & Co., Inc., was to have the use of such equipment of the Puget Sound Products Co. as it might desire, in return for which the Puget Sound Products Co. was to have free storage for its equipment at the premises.

Prior to acquiring the real property, the premises were examined by responsible officers of applicant who entered into an agreement with Mr. Worth C. Goss representing the Debtor in Possession, under which the latter agreed to assist Nelse Mortensen & Co., Inc., to obtain title to the real estate, to furnish free power to Nelse Mortensen & Co., Inc., and to allow said company the use of certain machinery and equipment on the premises. In return for this, the debtor in possession was to have the right of occupancy of the premises for the storage of its machinery and equipment.

The Seattle Association of Credit Men gave its co-operation to this arrangement, in connection with the sale of the equity of redemption to the Appellant, since the plan was of substantial benefit to the Association and the creditors which it represented.

The agreements clearly indicate that Nelse Mortensen & Co., Inc., agreed to the use of the premises by the Appellee in consideration for the use of Appellee's equipment, and therefore the claim of Nelse Mortensen & Co., Inc., for rental should be denied.

CONCLUSION

All of the property items, except heater and boiler, were covered by agreements between the United States and Puget Sound Products Co. and for that reason constitutes personal property which belongs to the Debtor in Possession, Puget Sound Products Co.

The heater and boiler were placed on the premises after the Puget Sound Products Co. executed its real estate mortgage. By agreement with the United States Government, the property so placed on the premises was not to be included under the terms of the real estate mortgage. Furthermore, Puget Sound Products Co. has at all times classified these items as personal property, as evidenced by outstanding chattel mortgages executed by said company.

Under the law, the items claimed by the Appellant are personal property. The items are not attached so as to be permanent parts of the building. The items have not been appropriated to a particular use, since Appellee's business is completely different from the business for which the equipment was originally appropriated. Finally and most important, the intention of the United States Government agencies, Puget Sound Products Co. and the Seattle Association of Credit Men, which is binding upon Nelse Mortensen & Co., Inc., by reason of both constructive and actual notice, has always been to treat the items as personal property.

The facts of the case and the finding of the Referee conclusively establish that there was an agreement between Nelse Mortensen & Co., Inc., Seattle Association

of Credit Men, and Puget Sound Products Co., that the latter company could use the premises without charge in exchange for Nelse Mortensen & Co., Inc., receiving Seattle Association of Credit Men's equity of redemption and the use of the Puget Sound Products Co.'s equipment.

For these reasons the decision of the lower court should be affirmed in all respects.

Respectfully submitted,

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